IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.03.2006

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 1447 of 1996
-o-

M. Raja .. Appellant/Defendant

Versus

1. Manakchand Jamath (deceased)
2. M. Parasmal Jain
3. Mrs. Badam Bai
4. M. Padam Chand
5. M. Parasmal Jain
6. M. Gautham Chand
7. M. Rajesh Kumar

(RR3 to 7 are brought on record as legal heirs of deceased first respondent as per the order dated 06.11.2003 made in CMP Nos. 15443 and 15444 of 2003) .. Respondents/Plaintiff

Second appeal under Section 100 CPC against the decree and judgment dated 19.02.1996 made in A.S. No. 157 of 1994 on the file of V Additional City Civil Judge, Madras confirming the decree and judgment dated 27.04.1993 made in O.S. No. 3023 of 1988 on the file of XII Assistant City Civil Judge, Madras.

For Appellant : Mr. Venkataraman
For Respondents : Mr. T. Thirumaran for RR2 to 7

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JUDGMENT

The sole defendant, who lost the case before the courts below is the appellant. The respondents 1 and 2 herein have filed the suit in O.S. No. 3023 of 1988 before the 12th Assistant City Civil Judge, Madras for eviction against the appellant herein, which was allowed, the appeal filed by him before the first appellate Court was also dismissed, hence the present second appeal.

2. For the sake of convenience, the parties shall hereinafter be referred to as they were arrayed before the trial court.

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3. The case of the plaintiffs is that they have purchased the suit property namely land in old Door No.52, new Door No.90 and 90/1, Syndenhams Road, Periamet, Madras - 3 comprised in RS No. 1264/15 measuring an extent of 2 grounds and 692 sq.ft., under sale deed dated 25.09.1987, which was registered as document No.1118/1987 on the file of Sub-registrar, Periamet. Soon after purchase, they have issued a notice, Ex.A3 dated 16.11.1987 calling upon the defendant to attorn tenancy in their favour. On receipt of the said notice, a reply was issued by the defendant under Ex.A4, dated 19.11.1987 stating that he is entitled to the benefits under the Tamil Nadu City Tenants Protection Act, hereinafter referred to as Act, as he constructed the existing superstructure in the suit property. The plaintiffs have issued another notice, Ex.A1 dated 01.12.1987 terminating the tenancy of the defendant ending with 31.12.1987 and called upon him to quit and deliver vacant possession. Thereafter, the said suit for ejectment was filed.

4. The trial court found that Ex.A1, notice of termination of tenancy issued by the Plaintiffs is valid; that the defendant has filed I.A. No. 20851 of 1988 under Section 9 of the Act, which was dismissed on 18.12.1992 on the ground that the defendant is not entitled to the benefits of the Act since, he has not stated in his pleadings that he has put up a permanent building nor proved it by valid evidence, besides the superstructure does not satisfy the requirement of the Act. The trial court, in the main suit held that the defendant is liable to surrender the vacant possession of the suit property to the plaintiffs after removal of the said temporary roof and decreed the suit.

5. Aggrieved by the decree and judgment of the trial court, the defendant has filed A.S. No. 157 of 1994 and the first appellate Court, after careful consideration of the materials on record, found that the plaintiffs have issued Ex.A3, notice informing the date of purchase of the suit property under a sale deed dated 25.08.1987; that in and by the said notice, it is pointed out that the defendant was a tenant under their vendors; that in the suit property, the defendant has put up a temporary superstructure, which was also leased out by him to the sub-tenants namely New Salem Timber and Sundaram Rubber Industries and called upon the defendant to attorn the tenancy in their favour and to pay rent to them; that the defendant has issued a reply notice under Ex.A4 stating that he was a tenant for about 45 years in the said premises by putting up permanent superstructure with walls and roofing and he is entitled to purchase the land under the provisions of the Act; that thereafter the plaintiffs have issued Ex.A1, notice dated 21.12.1987 terminating the tenancy of the defendant ending with 31.12.1987 and called upon him to deliver vacant possession and also pointed out that the defendant is not entitled to the benefits of the Act since he leased out the entire

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property to other sub-tenants; that pending suit, the defendant has filed an application in I.A. No. 20851 of 1988 under Section 9 of the Act, which was dismissed by the trial court on 18.12.1992 on the ground that the superstructure put up by him is temporary in nature, which did not satisfy the requirements of the building defined in the Act, besides, he is not in possession of the suit property; that aggrieved by the order in the said I.A. No. 20851 of 1988, the defendant has preferred CRP No. 2964 of 1995, which was also dismissed on 24.11.1995 by this Court on the ground that the defendant is not in physical possession of any part of the suit property and therefore he is not entitled to the benefits of the Act, besides that the suit itself was decreed and that the defence taken by the defendant that Ex.A1 was not received was also rejected by pointing out that the same was served on him, which can be evidenced under acknowledgment, Ex.A2. It is also pointed out by the first appellate Court that the plea that the notice under Section 11 of the Act sent to the defendant is not in accordance with law is concerned, it held that the defendant is not in possession of the suit property; that the petition filed by him under Section 9 of the Act was dismissed and the revision filed by him as against the same was also dismissed on the ground that he was not in physical possession of the suit property and the said order also reached finality, hence, the said defence is unsustainable in law and dismissed the appeal.

6. Mr. Venkataraman, learned counsel appearing for the defendant/appellant submits that Ex.A1 was nothing but a rejoinder to Ex.A3, hence, it ought to have been addressed to the counsel for the defendant/appellant, but the same was sent to the defendant/appellant, hence, it is not a valid notice; that Section 11 of the Act is mandatory and non-compliance of the same would vitiate the suit. In this context, the learned counsel relied on the decision of a Division Bench of this Court reported in (Sri Agastheeswarar Prasanna Venkatesa Perumal Devasthanam, by its heriditary Trustee P. Valliammal vs. M. Narasimhan) 1982 Madras Low Journal Reports page 70 wherein in para 9 and 10, it was held thus:-

> 9. Thus, the legal position is clear that Section 11 of the Act is mandatory and its non-compliance will result in the dismissal of the suit but that the notice contemplated by Section 11 can be waived by the tenant little by express word's or by implied conduct. That the tenant for whose benefit Section 11 had been introduced in the Act can waive the benefit of the section is clear not only from the decisions referred to above but also from the decision of the Privy Council in Vellaiyan Chettiar vs. The Province of

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> Madras where while construing the scope of Section 80, Civil Procedure Code, which contains a similar prohibition the Privy Council held that a suit cannot be instituted without following the provisions of Section 80 but the notice under Section 80 could be waived if the authority concerned thinks fit to do so as it is for his protection that the notice is required and if in a particular case he does not require that protection and says so he can lawfully waive his right and that there is no inconsistency between the proposition that the provisions of this Section are mandatory and must be enforced by the Court and that they may be waived by the waived by the authority for whose benefit they are provided. The Court also observed that where the plaintiffs contend that the defendants have waived their right to the notice or alternatively, they estopped from saying that they did not, the burden lies on the plaintiffs to establish the facts upon which they rely for raising the implication or creating the estoppel.
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> 10. From the above discussion it is seen that Section 11 of the Act is mandatory and a suit filed without the requisite notice under Section 11 is liable to be dismissed but that the notice can be waived by the defendant either expressly or impliedly by his conduct and that the burden of proving that the defendant has either expressly or by implication waived the said notice is on the plaintiff. The question is whether the defendant in this case by his conduct in filing an application under Section 9 can be taken to have waived the notice under Section 11 so as to enable the plaintiff to maintain the suit notwithstanding the non-compliance with the provisions of Section 11.

7. Mr. Thirumaran, learned counsel appearing for the respondents 2 to 7 submits that Ex.A3, notice was issued by the respondents/Plaintiffs calling upon the defendant/ appellant to attorn tenancy in their favour, however, Ex.A1 notice was issued for termination of the tenancy, hence, it was rightly issued to the defendant/appellant and the plea that the same is nothing but a rejoinder to Ex.A3 is invalid; that the defendant/appellant is not in physical possession of the suit property, hence, the non-issuance of

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notice under Section 11 of the Act no way invalidate the suit. In this context, the learned counsel relied on the decision of this Court reported in (Hindustan Petroleum Corporation Ltd, Madras-8 and another vs. K.M. Yakub (died) by Lrs and 2 others) I.L.R. (1996) 3 Madras 671 wherein it was held by a learned single Judge in Para No. 8 and 14 as follows:-

> "8. As per the various decisions of this Court, physical possession by the tenant must be proved, and only such persons can claim the benefit of the Act.
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> 14. In view of the finding in the civil revision petition aforementioned, it cannot be doubted that the first defendant herein is not in possession. If possession is a sine qua non to claim the benefit of the Act, and if it is found that the first defendant is not in possession, then, he cannot be said to be a tenant under the Act. The finding in C.R.P. No. 2100 of 1985 concludes the matter, even though that was in an interloctuary stage. A reading of Section 11 of the City Tenants Protection Act makes it clear that the institution of the suit is barred only against those tenants who are entitled to claim the benefits of the tenancy or who come within the definition of 'tenant' under the Act. I hold that the finding in C.R.P. 2100 of 1995 even though it is in the same suit, will be conclusive so far as the first appellant in the second appeal is concerned...

8. It is not in dispute that the appellant is out of possession. Section 11 of the Act says that no suit for ejectment or application under Section 41 of the Presidency Small Causes Court Act, 1882 shall be instituted or presented against a tenant until the expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any and stating the amount thereof..... Section 11 requires the landlord, before seeking to eject a tenant, to give him three months notice, however, the same does not govern a case where the tenant is not the owner of the superstructure nor in possession. Section 11 of the Act is limited in its operation to the case, where the tenant is not the owner of the superstructure, hence, the landlord need not give any notice under Section 11 of the Act and the argument of the learned counsel for the

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appellant is answered accordingly.

9. In this case, as mentioned above, the appellant is not in possession of the suit property. The appellant has filed an application under Section 9 of the Act before the trial court, which was dismissed on the ground that the superstructure put up by the appellant is temporary in nature and it does not satisfy the requirements of the building, as defined under the Act, besides, he was not in possession of the suit property. As against the same, the appellant herein has filed CRP No. 2964 of 1995, which was dismissed by this Court holding that the appellant is not in physical possession of any part of the suit property and therefore he is not entitled to the benefits of the Act and the said order also reached finality.

10. In view of the above discussions and also the concurrent findings of the courts below on factual aspects, this Court finds that there is no question of law, much less substantial question of law involved in this second appeal warranting interference of the well considered decree and judgment of the courts below. The second appeal is dismissed. No costs.

11. The learned counsel appearing for the appellant prays time of four months to deliver vacant possession of the suit property to the respondent. Considering the said request, time of four months sought for is granted provided the appellant files an affidavit of undertaking to that effect within a period of two weeks.

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Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The V Additional City Civil Judge
   City Civil Court
   Madras

2. The XII Assistant City Civil Judge
   City Civil Court
   Madras

3. The Registrar, City Civil Court, madras

4. The Section Officer
   V.R. Section
   High Court, Madras - 600 104

+ one cc to Mr. T. Thirumaran, Advocate sr no. 14939
+ one cc to Mr. K. Venkataraman, Advocate sr no. 14829

NM(25.04.2006)

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